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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1943

No. 449

MERGER MINES CORPORATION, a corporation, MORRIS PEARSON and EBBA PEARSON, his wife,

Petitioners,

vs.

J. V. GRISMER, P. R. SIMPSON, M. C. THORNHILL and O. C. NEWMAN.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, and Brief in Support Thereof.

R. W. NUZUM,

Attorney for Petitioners, Morris Pearson and Ebba Pearson, his wife.

WILMOT W. GARVIN,

Of Counsel for Petitioners, Morris Pearson and Ebba Pearson, his wife.

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STATUTES

Judicial Code, Section 240 amended, Title 28 U. S. C. A. Section 347 (a). (Mar. 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Mar. 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938 5-10

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vs.

J. V. GRISMER, P. R. SIMPSON, M. C. THORNHILL and O. C. NEWMAN.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit,

The petitioners, Morris Pearson and Ebba Pearson, his wife, pray that a Writ of certiorari issue to review the decree entered in the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled matter, which decree was filed and entered July 27, 1943, (R. p. 354) affirming as modified the judgment of the District Court of the United States for the Eastern District of Washington, Northern Division. The opinion (R. pp. 335-353) upon which the decree of the Circuit Court of Appeals was entered is reported in 137 Fed. 2d 335 (Advance Opinions.)

SUMMARY STATEMENT OF THE MATTER INVOLVED

This action arose by virtue of an agreement between Pearson and the defendant Merger Mines Corporation, wherein in order to save the corporation from insolvency by virtue of third party claims the Pearsons agreed with the corporation to loan stock to the Corporation to the end that the proceeds therefrom might liquidate the indebtedness and save the corporation. They loaned in excess of 772,000 shares of the stock of the Corporation. Exhibit "F" (R. pp. 159 to 189) shows the total borrowed stock sold and issued by the Corporation to third party creditors from the stock turned over to the Corporation by Pearsons to be 770,541 shares. The capital stock of the corporation was to be increased by 1,000,000 shares, which was done, and that million shares remain in the treasury. We are not citing the record, because the facts were undisputed.

The By-Laws, being Exhibit "E", found at Page 307 of the Supplemental Record, at Section 39, Subdivision H thereof, provides: "While the shares remain the property of the corporation, they are not assessable, nor must dividends be declared thereon, but all assessments and dividends must be apportioned among the shares held by the other stockholders of the Corporation."

The contract with reference to issuing Pearsons' stock from the increase is found in Exhibit "A", pages 155 and 157 of the record. This shows the stock was to be returned to the Pearsons, share for share,

as soon as the new issue is at hand. As to the second block of it, "This stock to be returned to Morris Pearson as soon as the new issue of stock is available."

There is no dispute as to the loan of the stock, and said stock was never returned to the Pearsons, but used by the corporation, and the second issue remains in the treasury. Pearson was advised the stock could not be issued without registration, and it never was registered. This testimony is found in the testimony of LeMaster, pages 48 and 49 of the record, and Exhibits 7, 8, 9, 9A, and 9B, found at pages 207 to 219, inclusive, of the record, and exhibits 10 to 14, found at pages 220 to 227, inclusive, of the record, being letters from the Regional Director of the Securities and Exchange Commission. He was so advised by Mr. Whitla, one of the attorneys for the corporation, and an officer thereof. See record pages 78, 79, 84 and 85. He was so advised by Mr. Wayne, the General Counsel of the Corporation. See record pages 109 to 114, inclusive, and the testimony of Morris Pearson, pages 124 to 127, and 142 to 149 of the record, showing Pearson was attempting to have the stock issued to him. That Pearson was endeavoring to get the stock issued is shown by the testimony of LeMaster, Whitla, and Wayne. See Exhibits 7 and 8, at Page 8; Exhibit 9, at pages 207 and 208; Exhibits 9A and 9B at pages 212 to 219; and Exhibits 10, 11, 12 and 14, on pages 222, 224, 226 and 227.

The position taken by the attorneys for the plain-

tiff is shown on page 154 of the record, and ending on page 155. Questioned by Judge Schwellenbach:

> "Judge Schwellenbach: Do you contend you can make him pay assessments on stock he hasn't got?
>
> "Mr. Graves: Yes, just so.
>
> "Judge Schwellenbach: And he can't possibly get?
>
> "Mr. Graves: It is my contention that he can, but whether he can or can't, yes."

That the stock could not be registered, see the testimony of LeMaster, pages 48 and 49 of the record; Whitla, 78 and 79 of the record; Whitla, 84 and 85 of the record; and Wayne, 109 to 114, inclusive, of the record, giving the reasons therefor.